United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1906.

No. 1729.

THEODORE BALSTER, APPELLANT,

vs.

FLORENCE V. B. CADICK, EMMA I. BALSTER, NORRIS JOHN BALSTER, INFANT, BY FLORENCE V. B. CADICK, HIS NEXT FRIEND, AND CHARLES KOHLER BALSTER, INFANT, BY FLORENCE V. B. CADICK, HIS NEXT FRIEND.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 12, 1906.

In the Court of Appeals of the District of Columbia.

No. 1729.

THEODORE BALSTER, Appellant,
vs.
FLORENCE V. B. CADICK ET AL.

a Supreme Court of the District of Columbia.

At Law. No. 48184.

FLORENCE V. B. CADICK, EMMA I. BALSTER, NORRIS JOHN BALSTER, Infant, by FLORENCE V. B. CADICK, His Next Friend, and CHARLES KOHLER BALSTER, Infant, by FLORENCE V. B. CADICK, His Next Friend, Plaintiffs,
vs.
THEODORE BALSTER, Defendant.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:

1 *Declaration in Ejectment.*

Filed December 18, 1905.

In the Supreme Court of the District of Columbia.

At Law. 48184.

FLORENCE V. B. CADICK, EMMA I. BALSTER, NORRIS JOHN BALSTER, Infant, by FLORENCE V. B. CADICK, His Next Friend, and CHARLES KOHLER BALSTER, Infant, by FLORENCE V. B. CADICK, His Next Friend, Plaintiffs,
vs.
THEODORE BALSTER, Defendant.

The plaintiffs sue the defendant to recover the land and premises described as the south fifteen feet nine inches front, by the full depth thereof of Lot No. 4 in Square No. 465, in the City of

Washington, District of Columbia, improved by a brick house known as No. 437 Sixth Street, Southwest, in said city, in which the plaintiffs claim the fee simple and of which the plaintiffs were lawfully possessed on, to wit, the 5th day of July, 1903, when the defendant wrongfully entered the same and unlawfully ejected the plaintiffs therefrom, and wrongfully detains possession of the same, from the plaintiffs, and has wrongfully detained possession thereof from the plaintiffs since, to wit, the 5th day of July, 1903, and is wrongfully exercising acts of ownership thereon; and the plaintiffs claim the possession of the said land and premises described as the
2 south fifteen feet, nine inches front, by the full depth thereof, of said Lot, numbered 4, in Square numbered 465, in the City of Washington, District of Columbia, with the improvements thereon and the appurtenances thereof, and the costs of this suit.

2. And the plaintiffs further sue the defendant for money payable by the defendant to the plaintiffs for that the defendant, having so, as aforesaid, ejected the plaintiffs from the aforesaid premises, and having, as aforesaid, wrongfully detained possession of the same, hath, from the said, to wit, the 5th day of July, 1903, taken and received and still continues to take and receive the rents, issues and profits of the said described premises and hath from the aforesaid date used, occupied and enjoyed the said premises and still continues to use, occupy and enjoy the said premises, to the damage of the plaintiffs, in the sum of $1000.00, and the plaintiffs claim the sum of $1000.00 besides costs.

COLDREN & FENNING,
Attorneys for Plaintiffs.

The defendant is to plead hereto on or before the 20th day, exclusive of Sundays and legal holidays, occurring after the service hereof; otherwise judgment.

COLDREN & FENNING,
Attorneys for Plaintiffs.

3 *Memoranda.*

January 15, 1906.—Defendant's plea not guilty filed.

January 26, 1906.—Joinder of issue, filed.

June 6, 1906.—Verdict for plaintiffs for possession and Seven Hundred Dollars ($700.00) with interest from June 21" 1906, and costs.

June 21, 1906.—Motion for new trial overruled, and Judgment on Verdict for plaintiffs for Seven Hundred Dollars ($700.00) with interest from date and costs. Appeal by defendant and penalty of supersedeas bond fixed at Fourteen Hundred Dollars ($1400.00); bond for costs at One Hundred Dollars ($100.00).

July 13, 1906.—Appeal bond filed.

4 July 19, 1906.—Amended Judgment for Plaintiffs for possession of south fifteen (15) feet nine (9) inches front by full depth thereof of Lot four (4) Square four hundred and sixty-five (465) and Seven Hundred Dollars ($700.00) with interest from June 21, 1906, and costs.

Supreme Court of the District of Columbia.

MONDAY, *July 30th*, 1906.

Session resumed pursuant to adjournment, Hon. Ashley M. Gould, Justice presiding.

At Law. No. 48184.

FLORENCE V. B. CADICK ET AL., Plaintiffs,
vs.
THEODORE BALSTER, Defendant.

The bill of exceptions in this cause having been settled by consent of counsel and submitted for the consideration of the Court is this 30th day of July 1906, signed and ordered of record as of the day the same was noted.

5 *Bill of Exceptions.*

Filed July 30, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48184.

FLORENCE V. B. CADICK ET AL., Plaintiffs,
vs.
THEODORE BALSTER, Defendant.

Be it remembered that at the trial of this cause before the Hon. Daniel Thew Wright, one of the Justices of the Supreme Court of the District of Columbia, and a jury duly empannelled and sworn to try the issue pending between the plaintiffs and defendant, the plaintiffs, to maintain the issue upon their part joined, offered, read and gave before the court and jury the following evidence and testimony and none other, to wit:

A deed from Wilbur H. McKnew to Theodore Balster, dated the 23d day of May, 1881, recorded the same day in Liber 947 at folio 76, Land Records of the District of Columbia, conveying to the said Theodore Balster, his heirs and assigns forever, for an expressed consideration of Two Thousand, Three Hundred and Fifty ($2350.) dollars. "All and certain those pieces and parcels of land and premises situate and being in the city of Washington, in the District of Columbia, and known as and being Lots four (4) and five (5) in Square numbered Four hundred and sixty-five (#465)."

6 "To have and to hold the said pieces or parcels of ground and premises and appurtenances unto the said party of the second part his heirs and assigns, to his & their sole use, benefit and behoof forever."

A deed from Theodore Balster and Johannah Balster, his wife, to Louise M. Kohler, dated the 7th day of March, 1895, recorded the

3d day of April, 1895 in Liber 2006 folio 173, Land Records of the District of Columbia, conveying to the said Louise M. Kohler, her heirs and assigns forever, for an expressed consideration of Ten ($10.) dollars, "All those certain pieces and parcels of land and premises situate in the city of Washington, District of Columbia, and known and distinguished as all of Lot numbered Four (4) and the South Seven (7) feet and ten (10) inches front by the full depth thereof of Lot numbered Five (5) in Square numbered Four hundred and sixty-five (465)." "To have and to hold the said pieces or parcels of land and premises, with the appurtenances, unto the said party of the second part, her heirs and assigns, to her and their sole use, benefit and behoof forever."

A deed from Louise M. Kohler, unmarried, to Johannah Balster, dated the 8th day of March, 1895, recorded the 3d day of April, 1895, in Liber 2006, folio 173, Land Records of the District of Columbia, conveying to the said Johannah Balster, her heirs and assigns forever, for an expressed consideration of Ten ($10.) dollars, "All those certain pieces and parcels of land and premises situate in the city of Washington, District of Columbia, and known and distinguished as all of lot numbered Four (4) and the South
7 Seven (7) feet and ten (10) inches by the full depth thereof of Lot numbered Five (5) in Square numbered Four Hundred and sixty-five (465)." "To have and to hold the said pieces or parcels of land and premises, with the appurtenances, unto the said party of the second part, her heirs and assigns, to her and their sole use, benefit and behoof forever." There being no controversy as to the execution and delivery of the foregoing deeds and their due recordation and said deeds being in the ordinary and usual form, the substantial parts thereof alone as above set out were read in evidence.

And thereupon, the plaintiffs, to further maintain the issue upon their part joined, and the plaintiff, EMMA ISABEL BALSTER, being of lawful age was duly sworn to testify the truth, the whole truth and nothing but the truth, gave evidence and testimony that she is the daughter of the defendant and Johannah Balster being the same Johannah Balster mentioned in the deeds in evidence and the wife of the defendant; that the plaintiffs, Florence V. B. Cadick, Charles Kohler Balster and Norris John Balster, respectively, are her sister and brothers and the children of the aid Theodore Balster and Johannah Balster and that said plaintiffs and the witness are the only heirs at law of said Theodore Balster and Johannah Balster; that both the witness and said plaintiff, Florence V. B. Cadick, are above the age of twenty-one years but that the plaintiffs, Charles Kohler Balster and Norris John Balster are minors under the age of twenty-one years; that said Louise N. Kohler is the aunt of the plaintiffs, sister-in-law of the defendant and was the sister of said Johannah Balster; that said Johannah Balster is dead, having
8 died about the 4th day of July, 1903; that at the date of the death of Johannah Balster and from a time prior to the date of the deeds from Theodore Balster and wife to Louise M. Kohler and from Louise M. Kohler to Johannah Balster, the plaintiffs, with

their father and mother occupied and resided in and upon the premises in suit, except the plaintiff, Florence V. B. Cadick, who resided there until sometime before the death of Johannah Balster when she removed therefrom; that since the death of said Johannah Balster the plaintiffs, Florence V. B. Cadick, Norris John Balster and the witness have not resided in or occupied the premises in suit but the defendant with the plaintiff, Charles Kohler Balster, who is an infant of tender years, have occupied and resided in the said premises; that two houses stand upon the premises mentioned in the deeds last referred to, one of which is situated upon the premises in suit and the other adjoins same but the rent and profits thereof, that is of the adjoining house, are collected by Frederick A. Fenning and James B. Archer, Jr., Receivers, appointed by the Supreme Court of the District of Columbia, sitting in Equity, in a certain cause formerly pending among the parties hereto involving the equitable title of the premises aforesaid, but not the legal title; that the rent received for the adjoining property is twenty ($20) dollars per month. There being no cross examination of said witness and her testimony being concluded the plaintiff gave and read in evidence a certified copy of the last will and testament of Jahannah Balster, deceased, as follows:

9 *Last Will and Testament.*

In the name of the beloved Father of all, amen.

I, Johannah Balster of the city of Washington, District of Columbia, being about 44 years of age and being of sound and disposing mind and memory do make, publish and declare this my last will and testament hereby revoking and making null and void all other last wills and testaments by me made heretofore:

First.—My will is that all my just debts and funeral expenses shall be paid out of my estate as soon after my decease as shall be found convenient.

Second.—I give, devise and bequeath to my children Florence Virginia Balster, Emma Isabel Balster, Norris John Balster and Charles Kohler Balster all my property of every kind to be divided between them equally.

I hereby appoint Dr. James A. Hunter of Washington, D. C. my executor.

In testimony whereof I have set my hand to this, my last will and testament, at Washington, D. C., this 13th day of February in the year of our Lord Nineteen Hundred.

JOHANNAH BALSTER.

The foregoing instrument was signed by the said Johannah Balster in our presence and by her published and declared as and for her last will and testament, and at her request, and in our presence and in the presence of each other we hereunto subscribe our

names as attesting witnesses at Washington, D. C., this 13th
10 day of February, A. D. 1900.

R. E. BOYD,
Resides at 416 9 *St., N. W.*
J. T. HUNTER,
Resides at 417 9*th N. W.*
MICHAEL SILKE,
Resides at 417 9*th St., N. W.*

And thereupon the defendant, through his counsel, in open court admitted and conceded that the foregoing last will and testament of Johannah Balster was duly admitted to probate and record as a will of real and personal estate by the Supreme Court of the District of Columbia, Holding a Probate Court; that the premises in suit is a part of the real estate described in the deeds in evidence; that the defendant is in exclusive possession of, and exercising acts of ownership and dominion over the same under claim of right; that the house occupied by him, being the premises in suit, is practically identical with the adjoining house and premises, and that the reasonable rental value of the premises in suit is twenty ($20.) dollars per month and he has occupied the same about thirty-five months.

The foregoing being substantially all, and the plaintiffs giving no other or further, evidence or testimony, announced their case in chief closed and rested.

And thereupon the defendant, through his counsel, by way of opening statement, announced that he relied alone for his defense, upon a tenancy by *the* c-urtesy in and to the premises in suit; that he expected to prove and proffered to the court evidence and testimony that he and the said Johannah Balster were lawfully married; that the plaintiffs were their children born of said marriage; that the
defendant acquired the property mentioned and described in
11 the deeds in evidence in his own right, purchasing the same with his own funds and that no part of the consideration of said purchase came from the said Johannah Balster but the defendant was seized of the same in fee simple in his own right at the time of conveying the same to Louise M. Kohler by the deed in evidence; that the nominal consideration of ten ($10) dollars mentioned in the said deed from the defendant to said Louise M. Kohler was not paid to defendant nor was any sum or any valuable consideration paid or passed to the defendant from said Louise M. Kohler or said Johannah Balster or from either of them or on their or either of their behalf; that the nominal consideration of ten ($10.) dollars mentioned in the deed from Louise M. Kohler to Johannah Balster was not paid nor was any sum or any valuable consideration paid or passed to the said Louise M. Kohler from the said Johannah Balster or from any one on her behalf; that as a matter of fact the said deeds were executed and delivered under the following circumstances, namely: the defendant for a long time prior to the execution and delivery of said deeds was a chronic sufferer from inflammatory rheumatism and at the time of making said deeds belived that his death was imminent, and in order that the said prop-

erty in case of his sudden death should be vested in his wife without the cost and expense of probating a will voluntarily conveyed the same to said Louise M. Kohler as an intermediary to pass the title to his wife, said Johannah Balster and the said Louise M. Kohler conveyed the same to Johannah Balster in pursuance of the arrangement by the deeds aforesaid; that she was seized of the same
12 in her lifetime and issue was born to her and the defendant in the persons of the plaintiffs; that the said Johannah Balster died suddenly on the 5th day of July, 1903 the defendant thereby surviving her, and that the defendant learned for the first time after her death that she had executed the will in evidence.

And upon the announcement of counsel in the opening statement for the defendant the plaintiffs, through their counsel, moved the court upon said statement and proffer aforesaid to direct a verdict for the plaintiffs; which motion was by the court granted and the jury accordingly returned their verdict for the plaintiffs.

To the ruling of the justice presiding in granting said motion the defendant, by his attorney then and there in the presence of the jury noted an exception before the jury rendered its verdict as by the court directed. After noting said exception and making the same a part of the record, which is also made a part hereof, the jury rendered its verdict in favor of the plaintiffs, as by the court directed. And because the matters and things hereinabove recited are not matters of record and because the defendant desires to present his exceptions to the court of appeals of the District of Columbia, he moves the court to sign and seal this, his bill of exceptions, to have the same force and effect as if the same were signed and sealed in the presence of the jury; which motion is by the court granted, and the defendant requests the justice presiding at the trial to sign
13 and seal this his bill of exceptions and make the same a part of the record, according to the requirements of the statute in such case made and provided, and it is accordingly done, now for then, this 30th day of July, 1906.

DAN THEW WRIGHT, *Justice.* [SEAL.]

Settled by consent: July 31, 1906.

COLDREN & FENNING,
Attorneys for Plaintiffs.
JAMES B. ARCHER, JR.,
Attorney for Defendant.

Memorandum.

August 31, 1906.—Time to file record in Court of Appeals extended to October 1, 1906.

Designation to Clerk for Preparation of Transcript.

Filed September 26, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48184.

FLORENCE V. B. CADICK ET AL., Plaintiffs,
vs.
THEODORE BALSTER, Defendant.

The clerk of the court will include in the transcript of
14 the record on appeal in the above entitled cause the following:

1. Declaration and notice to plead, Dec. 18, 1905.
2. Memo. Plea. Jan. 15, 1906.
3. Memo. Joinder. Jan. 26, 1906.
4. Memo. of verdict for plaintiff, Jun- 6, 1906.
5. Memo. of Judgment. June 21, 1906.
6. Memo. of appeal noted. June 21, 1906.
7. Memo. of Bond. July 13, 1906.
8. Memo. of amendment of judgment. July 19, 1906.
9. Bill of exceptions. July 30, 1906.
10. Memo. of extension of time for record. Aug. 31, 1906.
11. Mem. of this.

JAMES B. ARCHER, JR.,
Att'y for Defendant.

O. K.
COLDREN & FENNING,
Att'ys for Plaintiffs.

15 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 14, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 48184 at law, wherein Florence V. B. Cadick, *et al.*, are Plaintiffs, and Theodore Balster, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington in said District, this 29″ day of September, A. D. 1906.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1729. Theodore Balster, appellant, *vs.* Florence V. B. Cadick, *et al.* Court of Appeals, District of Columbia. Filed Sep. 29, 1906. Henry W. Hodges, clerk.

OF THE DISTRICT OF COL

OCTOBER TERM, 1906

No. 1729.

THEODORE BALSTER, APP

vs.

ENCE V. B. CADICK ET A

BRIEF FOR APPEL

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. 1729.

THEODORE BALSTER, APPELLANT,

vs.

FLORENCE V. B. CADICK ET AL., APPELLEES.

BRIEF FOR APPELLANT.

Statement of Facts.

This was an action of ejectment by appellees to recover the south 15 feet 9 inches of lot 4 in square 465, instituted December 18, 1905. The evidence on behalf of the plaintiffs below was that they were the children of the defendant below; that he had acquired the property in suit from Wilbur H. McKnew by deed in ordinary form dated May 23, 1881, for an expressed consideration of $2,350; that by deed dated the 7th of March, 1895, he and his wife, Johannah Balster, mother of appellees, conveyed the premises in suit to Louise M. Purse, sister of the wife, who on the next day conveyed the same to Johannah Balster, the wife aforesaid. Both deeds were recorded the 3d day of April, 1895, both expressed a consideration of $10, and were in the usual and ordinary form; that appellees are the children born of the marriage of appellant and said Johannah Balster; that Johannah died about the 4th of July, 1903; that for a time prior to the deeds last mentioned,

and at the time of the wife's death, the unmarried plaintiffs with their father and mother lived upon the premises, one daughter being married and living elsewhere; that since the death of the wife appellant, with one of the infant appellees, has continued to reside upon the premises, appellant claiming ownership and exclusive possession. The appellee proffered evidence that there was no real consideration for the deeds from him to Louise M. Purse and from her to the wife; that the nominal consideration did not actually pass; that the deeds were executed while the defendant thought himself in danger of death from illness and for the purpose of provisionally investing his wife with title; that the wife died suddenly, leaving him surviving, and he learned after her death that she had made a will giving, devising, and bequeathing "to my children," by name, "all my property of every kind to be divided between them equally." The appellees, for the purpose of the motion, admitting the proffer of the defendant, moved the court to direct a verdict for the plaintiffs, which was done, and exception noted. Thereafter judgment was entered on the verdict from which this appeal is taken.

Assignment of Errors.

The appellant assigns as error the ruling of the trial court directing that the jury find for the plaintiffs notwithstanding the conditions for curtesy exhibited for the defendant by the record.

ARGUMENT.

As the appellees' chain of title begins with the deed of the appellant to Louise M. Purse and that of Louise M. Purse to his wife, Johannah Balster, dated the 7th and 8th day of *March, 1895, respectively*, the law of husband

and wife at common law and as contained in the Revised Statutes of the United States for the District of Columbia, passed in 1874, *control the situation.*

The provisions thereof applicable are as follows:

> "Sec. 727. In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts.
>
> "Sec. 728. Any married woman may convey, devise, and bequeath her property, or any interest therein, in the same manner and with like effect as if she were unmarried."

At common law the birth of issue and seizin of the wife vested in the husband a life estate, subject to his disposal, liable for his debts, and indefeasible.

The exception from the operation of section 727 of property acquired by gift or conveyance from the husband is a legislative recognition of his pre-existing rights and a consequent diminution and definition of her ownership.

Section 728 is a part of the same general enactment dealing with the reciprocal rights of husband and wife. It neither enlarges "her property" power to hold or enjoy the same to the exclusion or diminution of the "husband's property," and to that extent was not an enabling statute.

Before its enactment she could not convey, devise, or bequeath even the fee so acquired, although the husband had no interest beyond his life estate, and the grant of this power was an object worthy of the legislature without supposing an intention to authorize the disposition of the husband's property—his curtesy estate.

It is insisted that section 727 distinctly preserves the character of the husband's property in lands conveyed by him to his wife. It is family property which no general designation as "her property" is sufficient to include, and that the two sections should be so reconciled as to permit the wife to convey, devise, and bequeath the fee, which is "her property," subject to the husband's curtesy, which is his property.

In the case at bar the wife acquired the property in suit by gift and conveyance from her husband.

175 U. S., 414; Rathbone *vs.* Hamilton.

The will of Johannah Balster, relied upon by appellees, devises no definite interest. "all my property" may refer as well to the fee subject to curtesy as to any other interest. It leaves to existing law the ascertainment of the precise nature of " all her property" and section 727, writing itself into the instruments of her title, engrafts an estate by curtesy upon the interest thereby conveyed to her. True, only the fee would descend by inheritance, but a devise to children preserves the family character of the property.

Two decisions are relied upon as construing section 728 against the appellant's contention, namely, Rathbone *vs.* Hamilton, 175 U. S., and Zeust *vs.* Staffan, 16 App. D. C., 141.

It is submitted neither is binding upon the court. Rathbone *vs.* Hamilton involved no question of curtesy as the curtesy tenant was presumed by law to be dead. Zeust *vs.* Staffan was a bill to obtain a decree of the validity of a will devising property acquired by the wife

by gift or conveyance from her husband, but the effect of the statute was not necessary to the decision as the curtesy estate was vested before its passage.

In the latter case the court held that the estate by the curtesy initiate, having vested before the passage of the act, was of such dignity as to be beyond the control of the legislature, and it is submitted that in this case such an estate is of sufficient dignity as to constitute a separate property in the husband not to be included in the general designation "her property" in section 728.

JAMES B. ARCHER, JR.,
JNO. LEWIS SMITH,
Attorneys for Appellant.

DISTRICT OF COLUMBIA,
FILED
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COURT OF APPEALS

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1906.

No. 1729.

THEODORE BALSTER, APPELLANT.

vs.

FLORENCE V. B. CADICK, EMMA I. BALSTER, NORRIS JOHN BALSTER, INFANT BY FLORENCE V. B. CADICK, HIS NEXT FRIEND, AND CHARLES KOHLER BALSTER, INFANT, BY FLORENCE V. B. CADICK, HIS NEXT FRIEND, APPELLEES.

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLEES.

COLDREN & FENNING,
CHARLES A. KEIGWIN,
Attorneys for Appellees.

IN THE

COURT OF APPEALS

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1906.

No. 1729.

THEODORE BALSTER, APPELLANT,

vs.

FLORENCE V. B. CADICK, *et al.*, APPELLEES.

BRIEF FOR THE APPELLEES.

Statement.

In ejectment brought by the appellees against the appellant, the former recovered a judgment upon a verdict directed by the court, from which judgment the present appeal is taken.

The appellant, Theodore Balster, on March 7, 1895, being then the owner and in possession of the premises sued for, conveyed the same to one Louise M. Kohler, his wife joining in the deed. On the next day, by another deed, Louise M. Kohler conveyed the same property to Johannah Balster, the wife of the appellant. Both deeds were recorded on April 3, 1895; both expressed a nominal consideration; in neither case was any consideration actually paid; and the two deeds constituted a single transaction, the purpose of the appellant being to vest the title in his wife (pp. 3, 4, 6). Several children had been born of the marriage between the appellant and his wife and were then living.

Johannah Balster died in 1903, still seized of the property, and leaving a will by which all her estate was devised to her four children, the present appellees. (p. 5). After the death of his wife, the appellant remained in possession of the property, and the present suit was brought by his children, as devisees under the will of their mother, to recover the possession.

The foregoing facts having been proven or admitted at the trial, the defendant, in the opening statement of his counsel, announced that he relied solely upon a title by curtesy, supposed to exist in him notwithstanding the transactions stated. To make out such title, he offered to prove that the conveyance to his wife was made by him in expectation of an early death and from a desire to vest the property in her at his death without the cost of probate proceedings, and he did not know, until after his wife's death, that she had made the will devising the property to her children.

Upon this statement of defense, on the motion of counsel for plaintiff, the court directed a verdict for the plaintiffs. An exception to this direction is the sole exception in the record, and raises the only question to be submitted for review by this court. (pp. 6, 7).

Argument.

That single question, of course, is, whether or not Mrs. Balster was competent to devise the property to her children in such manner as to defeat her surviving husband's right to curtesy.

The case is in all essential elements identical with, and is controlled by that of Hamilton vs. Rathbone, 175 U. S., 414.

The only ground upon which it is sought to distinguish the present case is the fact that the husband's expectations or hopes were disappointed by his survivorship of his wife and by the unanticipated making by her of a will.

It is not suggested that there was between the appellant and his wife, any agreement or understanding, in virtue of which she was not to make a will or otherwise to dispose of the property, or the ordinary legal effect of the transaction was to be in any way limited or varied. It was merely the personal and unspoken hope of the appellant that his wife should remain intestate and that he should have the curtesy if she died before him.

It would be difficult to find any color of authority for the proposition that any conveyance of property is subject to such private and unexpressed anticipations of the grantor, or that the effect of such a conveyance is altered by subsequent unexpected changes in the situation or relations of the parties.

No more plausible is the suggestion of appellant that, in the will of Mrs. Balster, the words, "all my property," are to be read as a devise only of the fee subject to her husband's right of curtesy.

The Act of 1874, Rev. St. D. C., sec. 728, in force at the date when Mrs. Balster acquired title, provided that a married woman might devise her property "in the same manner and with like effect as if she were unmarried."

The Act of 1896, in force when the will was drawn, was at least equally strong to the same effect.

Such language as the testatrix used, if it occurred in the will of an unmarried woman, would unquestionably carry not only the fee but all the interest of which the devisor died possessed.

The proposed limitation upon the effect of the devise in question necessarily assumes the existence of a present estate outstanding in the husband and carved out of the title. At the common law the estate by the curtesy initiate may have been such an estate. But the effect of the Married Woman's Act of 1869 was to abolish, for all practical purposes at least, the curtesy initiate, and to make the curtesy of the husband accrue, if it accrues at all, only upon the death of the wife, and even then only in the case of her intestacy. Hitz vs. Natl. Met. Bank, 111 U. S., 731; Uhler vs. Adams, 1 App. D. C., 392; Zeust vs. Staffan, 16 App. D. C., 141.

During the lifetime of the wife, the husband has, since 1869, not even the right of possession in her lands, and no such interest as will defeat or limit her disposal of them. Such being the case, there can be in him no such estate as will diminish or impair the wife's full property, or reduce the completeness of a devise of all her property to the naked fee.

It is accordingly submitted that the judgment appealed from should be affirmed.

COLDREN & FENNING,
CHARLES A. KEIGWIN,
Attorneys for the Appellees.